LIBRARY
SUPREME COURT, U. S.

SEP 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 736

JOHN KELLERMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SCHIMMEL & NACHBAR
Attorneys for Petitioner
Office & P. O. Address
186 Joralemon Street
Brooklyn, New York 11201
MAin 5-6444

LEO NACHBAR
Member of the Bar of the
Supreme Court of the
United States
Of Counsel

INDEX

PAGE

A. Opinion Below 1

B. The Grounds on Which the Jurisdiction of This Court Is Invoked 2

C. The Questions Presented for Review 2

D. Statutes Involved 3

E. A Concise Statement of the Case and the Material Facts Pertaining to Consideration of the Questions Presented 3

F. Basis for Jurisdiction in the United States District Court 6

G. Argument Amplifying the Reasons Relied on for the Allowance of the Writ 6

POINT ONE

The evidence adduced against the appellant Kellerman was insufficient as a matter of law to establish guilt beyond a reasonable doubt as to any of the counts upon which he was convicted. 6

POINT TWO

The evidence adduced against the appellant Kellerman was insufficient as a matter of law to establish guilt beyond a reasonable doubt as to the violation of the substantive statutes. 9

CONCLUSION 11

PAGE

APPENDIX A 1a

APPENDIX B 12a

AUTHORITIES CITED

Cases:

Ingram v. U. S., 360 U.S. 672 8

Parr v. U. S., 363 U.S. 370 (1960) 9, 10
Pinkerton v. U. S., 328 U.S. 640 (1946) 10

Ryan v. U. S., 129 F.2d 783 8

U. S. v. Borelli, 336 F.2d 376 (2 Cir., 1964) 6
U. S. v. Falcone, 109 F.2d 579 (2 Cir.,) 8
U. S. v. Goldberg, 25 Federal Cases 1342 ..... 7, 8
U. S. v. Peoni, 100 F.2d 401 8

Statutes:

18 U.S.C. 371 ..... 1, 3, 6, 8

18 U.S.C. 1341 ..... 2, 3, 6, 9

18 U.S.C. 1342 ..... 2, 3, 6

28 U.S.C. 1254 (1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

JOHN KELLERMAN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

Opinion Below

The United States Court of Appeals for the Second Circuit by judgment entered on July 24, 1970, unanimously affirmed a judgment in the United States District Court for the Southern District of New York after a trial by jury

before Honorable Milton Pollack convicting petitioner and four others of (1) conspiracy to violate the mail fraud statute, Title 18 U.S.C. §371 and (2) twenty substantial counts in violation of Title 18 U.S.C. §§1341, 1342.

The opinion of the United States Court of Appeals for the Second Circuit is set forth in Appendix A hereof.

There were no other opinions written in connection with the case.

B.

The Grounds on Which the Jurisdiction of This Court Is Invoked

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on July 24, 1970, as aforesaid.

C.

The Questions Presented for Review

1. Was the evidence adduced against the appellant Kellerman insufficient as a matter of law to establish guilt beyond a reasonable doubt as to the conspiracy count upon which he was convicted?

2. Was the evidence adduced against the appellant Kellerman insufficient as a matter of law to establish guilt beyond a reasonable doubt as to the substantive counts upon which he was convicted?

D.

Statutes Involved

The statutes involved are Sections 371 and 1341 of Title 18, United States Code.

Each of the foregoing is set forth in Appendix B of this petition.

E.

A Concise Statement of the Case and the Material Facts Pertaining to Consideration of the Questions Presented

(1) *State of the Case*

Petitioner was indicted in the United States District Court for the Southern District of New York under Indictment No. 68 CR 1016. Also named as defendants were Alphonse M. Confessore, Joseph Pucci, Charles Rivezzo, Philip Travers and Joseph Vergo.

The indictment charged all defendants jointly in one count with conspiracy to violate the mail fraud statute, Title 18, United States Code, §1341 and in twenty-one counts with mail fraud, in violation of Title 18, United States Code, §§371, 1341 and 1342.

The trial was held before Honorable Milton Pollack, United States District Judge and a jury. Trial commenced on October 9, 1969, after defendant Pucci was permitted to enter a plea of guilty to twelve of the twenty-two counts of the indictment.

On October 15, 1969, the jury found all remaining defendants guilty on all counts. Upon motion of defense counsel, judgment of acquittal was granted as to all defendants on the last substantive count, count twenty-two.

On December 5, 1969, Judge Pollack sentenced defendants Kellerman, Rivezzo and Travers to two years imprisonment on all counts concurrently and imposed a one year suspended sentence as to defendant Vergo, placing him on two years probation. Defendant Confessore died before the date of sentencing. Defendant Pucci was placed on two years probation.

As previously indicated, the conviction was affirmed on appeal to the United States Court of Appeals for the Second Circuit.

(2) *Material Facts Pertinent to the Issue Presented*

In May of 1967, defendant Joseph Pucci met defendant John Kellerman and during the course of a conversation Pucci said he was living off credit cards. Kellerman said he had credit cards, an embossing machine, and I.B.M. cards containing the names and numbers of credit holders for sale. The price was $7500.00. Pucci said he may have a buyer. Later, Pucci arranged a meeting at Kellerman's house to discuss the transaction.

At Kellerman's house Pucci met the defendant Confessore and went to Confessore's house. There Confessore told Pucci that it was not Kellerman's deal, but that it was his. Kellerman stated, however, that he was not selling any cards with the machine. The $7500.00 was for the machine itself.

Kellerman then appeared and said the machine was easily used. Defendants Travers, Pucci and Confessore then met

and Travers arranged that he would furnish a buyer, but the price was to be $10,000.00 and it was to include 500 unembossed cards. $2,500.00 was to be paid to Pucci and Travers for furnishing the buyer. Confessore agreed.

At a later meeting, Travers introduced Pucci to defendant Rivezzo. The latter requested an opportunity to see the machine and cards and a meeting took place with Confessore, Kellerman, Pucci, Rivezzo and defendant Vergo present at Vergo's house. Confessore and Kellerman carried the machine and a box of unembossed cards and a box of embossed cards into the basement. The machine did not operate properly. At that time Pucci took two credit cards, one being in the name of Joseph C. Giletto. A new meeting was arranged. Travers took the box of unembossed cards.

At the next meeting where all of the defendants but Kellerman were present, the machine still did not operate properly.

Rivezzo advanced money to buy a portable embossing machine and a tipping machine. These machines were purchased on June 6, 1967. On June 8, 1967, Confessore decided to bargain with employees of Diners Club, who apparently were suspicious, to produce the machines and cards provided that there be no arrests. However, Confessore changed his mind and was not seen again until he was arrested.

Between June 8, 1967 and July 4, 1967, the day of his arrest, Pucci used the Giletto card, which he had obtained on his first visit to Vergo's basement, for his own use and that of Travers.

The use that Pucci made of the Giletto credit card constituted the substantive count in the indictment.

F.

Basis for Jurisdiction in the United States District Court

The jurisdiction of the United States District Court for the Southern District of New York was invoked upon the ground that the crimes charged were violations of Federal law, to wit: 18 U.S.C. §371 and 18 U.S.C. §§1341, 1342, allegedly committed within the Southern District of New York.

G.

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

POINT ONE

The evidence adduced against the appellant Kellerman was insufficient as a matter of law to establish guilt beyond a reasonable doubt as to any of the counts upon which he was convicted.

Appellant Kellerman was convicted of twenty of the twenty-one counts of the indictment submitted to the jury, namely, count one, conspiracy, counts two to twenty, substantive counts of mail fraud.

The essence of the crime of conspiracy is an agrement between two or more persons to commit an illegal act. *U. S. v. Borelli*, 336 F.2d 376, 385 (C.A. 2). In the instant case, the prosecution showed that the appellant Kellerman at most initially spoke to Pucci about the sale of an embossing machine. Pucci himself never accepted an offer to purchase the machine. Pucci, in fact, told the appellant that he had

no money and that he was living off credit cards. When Pucci met the defendant Confessore, Pucci was told by Confessore that the deal was his and not Kellerman's. The appellant Kellerman's only participation was his aid in carrying the embossing machine from the house of the defendant Confessore to a meeting place which took place at the home of the defendant Vergo.

It should be noted at this time that an examination of the transcript of the trial will indicate that at no time is the appellant Kellerman mentioned by the government's witness Pucci, or any other witness on behalf of the government after the initial meeting which took place at the defendant Vergo's home. There was no showing that this appellant in any way conspired with Pucci or with anybody else to accomplish the unlawful purposes alleged in the indictment.

The appellant never participated in an illicit arrangement having as its basis an illegal agreement. The fact that a person tells somebody else that there may be an illegal transaction does not make that party a conspirator.

> "A mere discussion between parties about entering into a conspiracy, or as to the means to be adopted for the performance of an unlawful act, does not constitute a conspiracy unless the scheme or some proposed scheme is in fact assented to, concurred in by the parties in the same manner, so that their minds meet for the accomplishment of the proposed unlawful act." *U. S.* v. *Goldberg,* 25 Federal Cases 1342.

It is uncontradicted and as a matter of fact it was the government which established through its main witness that the appellant had absolutely no role and was not part of

any of the proposed transactions. Consequently, the appellant did not conspire. Whatever intentions may be attributed to this appellant, nevertheless such intentions did not make him a conspirator. "A mere intention to form a conspiracy, or a mere solicitation to others to unite in a projected conspiracy when as yet no conspiracy has been formed, does not meet the requirements of the law." *U. S.* v. *Goldberg, supra,* page 1346.

There was a complete failure to show that this appellant had any stake in the venture that was discussed with Confessore, Pucci, Travers and the others. The government must show that he had a stake in the conspiracy or in the arrangement. *U. S.* v. *Falcone,* 109 F.2d 579; *U. S.* v. *Peoni,* 100 F.2d 401. It should be noted that in the *Falcone* and *Peone* cases, the defendants there actually supplied the material for which the others were to carry out a criminal purpose. These facts were considerably more than was attributed to this appellant.

There was also a failure on the part of the government to establish that this appellant conspired with the specific intent that the mails of the United States be used. 18 U.S.C. 371, the conspiracy statute, has been interpreted as requiring that the government prove a specific intent on the part of the accused to violate a Federal statute. *Ingram* v. *U. S.,* 360 U.S. 672, 677, 678.

> "Evidence of a scheme or conspiracy . . . to use the mails unlawfully, even though one of the conspirators, (without the concurrence of the other), may use the mail." *Ryan* v. *U. S.,* 129 F.2d 783.

POINT TWO

The evidence adduced against the appellant Kellerman was insufficient as a matter of law to establish guilt beyond a reasonable doubt as to the violation of the substantive statutes.

The uncontroverted proof by the government's own witness, Pucci, shows that Pucci stole the credit card used by him to defraud the establishments which are part of the substantive counts. Pucci acted independently in using the credit card with another name inscribed on it. He in no way sought to benefit the appellant Kellerman or even the others. When one acts independently of the other members of the arrangement, he is not acting as a conspirator and is certainly not acting in furtherance of the aims of the conspiracy. The fraud by Pucci was completed when Pucci procured the benefits from the establishments that he went to and had used the said credit card. The subsequent use of the mails for the sending of documents to Diners Club did not have any relationship with the alleged scheme. *Parr* v. *U. S.*, 363 U.S. 370 mandates the dismissal of the indictment of the appellant Kellerman.

In the *Parr* case, as in the instant case, defendants were charged and convicted of substantive violations of the mail fraud statute, as well as the conspiracy to violate that statute. This court reversed the convictions on all counts on the ground that the indictment did not charge and the evidence did not show any use of the mails for the purpose of executing such scheme within the meaning of 18 U.S.C. §1341.

In the case at bar, the evidence viewed in the light most favorable to the government showed that at best the scheme was for the purpose of purchasing an embossing machine and the sale of cards to third parties. The substantive portion of the indictment flows from Pucci's use of the credit card. The credit card was taken by Pucci without the knowledge of the appellant, or any of the other parties involved. Thus, the appellant Kellerman is one giant step further removed from the use of the mails proven in the *Parr* case, *supra*. The court condemned the application of the mail fraud statute on the ground that the mailings were immaterial to the defendants or to the consummation of a scheme which had reached fruition when the defendants irrevocably received the goods and services in question. *Parr* v. *U. S.*, *supra*.

In the instant case, the scheme proven, which admittedly aborted, would have reached fruition upon the sale of the spurious cards. It should also be noted that unlike the situation in *Parr* where the use of the mails directly flowed from the defendant's personal use of the card, the instant scheme was to sell the card to a third party purchaser who may never have used it so as to bring about the required mailings.

Pucci's personal use of the credit card cannot sustain a conviction of Kellerman under the substantive count, since on the government's evidence the substantive counts cannot be sustained *a fortiori*, the conspiracy to violate the mail fraud statute (Count One) likewise should have been dismissed. *Parr* v. *U. S.*, *supra*, at page 393.

The counts which were submitted to the jury in the instant case on the basis of the ruling in *Pinkerton* v. *U. S.*, 328 U.S. 640, were that one member of a conspiracy may

be held liable for the substantive crimes committed by a co-conspirator in furtherance of the conspiracy. The appellant Kellerman submits that the evidence shows that Pucci's use of the credit card was not a part of the conspiracy in which the government evidence showed him to be a participant. It was therefore error to submit the twenty substantive counts to the jury and to instruct the jury that the facts relating to Pucci's use of the credit card could be considered in determining whether the government had established Kellerman's participation in a conspiracy to violate the mail fraud statute.

CONCLUSION

The petition should be granted and this Court in the exercise of its powers should order that the judgment of conviction be reversed and the indictment dismissed.

Respectfully submitted,

SCHIMMEL & NACHBAR
Attorneys for Petitioner

LEO NACHBAR
Of Counsel

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 662-63, 680-81—September Term, 1969.

(Argued March 20, 1970 Decided July 24, 1970.)

Docket Nos. 34380, 34389, 34599-600

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN KELLERMAN, CHARLES RIVEZZO, PHILIP TRAVERS and JOSEPH VERGO,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges;*
BONSAL,* *District Judge.*

Appeal by John Kellerman, Charles Rivezzo, Philip Travers and Joseph Vergo from judgments of conviction entered in the United States District Court for the Southern District of New York after a trial before Hon. Milton Pollack, *Judge,* and a jury.

Affirmed.

LEO NACHBAR, Brooklyn, N. Y., *for appellant John Kellerman.*

* Of the Southern District of New York, sitting by designation.

MICHAEL S. FAWER, New York, N. Y. (Neal J. Hurwitz and John S. Martin, Jr., New York, N. Y., of counsel), *for appellant Charles Rivezzo.*

DAVID M. MARKOWITZ, New York, N. Y., *for appellant Philip Travers.*

CHARLES A. STILLMAN, New York, N. Y. (Leonard S. Machtinger, New York, N. Y., of counsel), *for appellant Joseph Vergo.*

WALTER M. PHILLIPS, JR., Assistant United States Attorney, New York, N. Y. (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N. Y., Ross Sandler and Jack Kaplan, Assistant United States Attorneys, New York, N. Y., of counsel), *for appellee.*

MOORE, *Circuit Judge*:

Four defendants, John Kellerman, Charles Rivezzo, Philip Travers and Joseph Vergo appeal from judgments of conviction after a jury trial upon an indictment charging (1) a conspiracy to violate the mail fraud statute, 18 U.S.C. §1341 and (2) twenty substantive violations thereof. A co-defendant Joseph Pucci pleaded guilty during the trial to twelve of the twenty-two counts. Another defendant, Alphonse Confessore, also convicted, died before sentence. Judgment of acquittal as to all defendants was granted on count twenty-two.

The conspiracy was to sell and distribute counterfeit Diners' Club credit cards. Each defendant played a different role in the conspiracy. Beginning in February 1967

Diners' Club had its credit cards embossed by the Dashew Business Machines Co. where the defendant Confessore was employed as a mechanic to service its embossing machinery. A large machine known as a "databosser" performed the embossing operation. Confessore had access to this machine and to smaller portable embossing machines known as "datatypers." Confessore was a neighbor of the defendant Kellerman. In May 1967 Kellerman told the defendant Pucci that for $7,500 he would sell a portable embossing machine, credit cards and data cards containing the names and numbers of real Diners' Club cardholders. Pucci then approached the defendant Travers who indicated that he knew of someone who might be interested.

Thereafter Kellerman and Pucci met with Confessore who stated that the offer was his—not Kellerman's—and that no cards would be furnished with the machine. This information was relayed to Travers. At a subsequent meeting between Confessore, Pucci and Travers, Confessore agreed to supply 500 unembossed cards, the price to be increased to $10,000. Travers then introduced Pucci to the defendant Rivezzo who was represented as being interested in the Confessore offer. Rivezzo wished to see the machine and the cards.

The portable machine, a box of embossed and a box of unembossed cards were taken by Confessore and Kellerman to the basement area of a house in which the defendant Vergo and other tenants lived. The basement was apparently used by the tenants in common and was under the control of the landlord, Bini, and not of any particular tenant. There Vergo assisted in setting up the machine. Present also were Pucci, Rivezzo and Travers. They were unsuccessful in their attempt to cause the machine to function properly. A future meeting was scheduled. The ma-

chine and the embossed cards were left in Vergo's basement, the unembossed cards being taken by Travers to his home.

The second attempt to operate the machine failed and Confessore told Pucci, Rivezzo and Travers that he would have to buy additional machines, an additional datatyper and a machine to tip the embossed characters in black. The money for this purchase was produced by Rivezzo. The purchase of the additional machines was consummated but no counterfeit cards were embossed by the defendants. Previously, however, Pucci had taken from the box of embossed cards a counterfeit card in the name of Joseph C. Giletto in replacement of a card which Confessore had given to him and which he thought was better suited to his appearance than the other counterfeit card in the name of an "Irishman." This Giletto card was used by Pucci on many occasions, Travers being present at times and on one occasion requesting use of the card for his benefit. These uses are the subject of the substantive counts, and include items ranging from $337.89 and $303.51 (Northeast and American Airlines, respectively) down to $11.10 at a restaurant. Other facts are set forth in connection with the consideration of defendants' claims of error.

Pucci was the principal witness for the Government; the other defendants did not testify. The appellate arguments advanced on behalf of each defendant must be considered separately.

Kellerman

With respect to the conspiracy count, Kellerman in effect attacks the sufficiency of the evidence relating him to the conspiracy. As to the substantive counts, Kellerman claims that Pucci's use of the Giletto credit card for himself did

not establish Kellerman's guilt. Lastly, Kellerman complains that his counsel was not allowed on cross-examination to elicit Pucci's address at the time of trial.

Rivezzo

Rivezzo argues that the evidence, at best, showed a scheme to obtain blank credit cards, an embossing machine and to sell the embossed cards to third persons. Therefore, Rivezzo claims that no violation of the mail fraud statute has been established and that the indictment should be dismissed. He cites *Parr* v. *United States*, 363 U.S. 370 (1960) as requiring this result. As to the substantive counts, Rivezzo asserts that Pucci's use of the Giletto card was not in furtherance of any conspiracy in which he may have been involved. Errors in the admission of exhibits and certain allegedly irrelevant testimony are set forth as additional grounds for reversal.

Travers

Travers also relies on the *Parr* decision. He contends in addition that the actual use by Pucci and himself of the Giletto card would constitute a separate conspiracy and that there was insufficient evidence to connect that conspiracy with the larger one for which all were convicted.

Vergo

Vergo adopts the arguments advanced in the Kellerman and Rivezzo briefs and claims that they apply with even greater weight to him. He also urges (1) error in the denial of his motion to suppress certain evidence seized in Vergo's house without a warrant and (2) that our recent decision in *United States* v. *Bless*, 422 F.2d 210 (2d Cir. 1970) requires reversal of his conviction.

I.

In an attempt to bring their case into close analogy with *Parr* v. *United States*, 363 U.S. 370 (1960), defendants would construe their conspiracy as merely involving the sale of an embossing machine, unembossed Diners' Club cards and IBM cards. They argue that the scheme ended at this point, the sale would have been completed without any use of the mails and, hence, the fact situation in *Parr* is paralleled. However, this argument overlooks the nature of a Diners' Club card. The card has no value *qua* card. The conspirators hopefully were realizing $7,500 to $10,000 from a purchaser who in turn would capitalize on his purchase by selling and putting into circulation these spurious Diners' Club cards. In the hands of this ultimate purchaser, their value would be found in the obtaining of merchandise and services at the expense of the real cardholders and the suppliers. This ultimate use and the attainment of this ultimate objective required the use of the mails. The courts will not be so unworldly or naive as to be unaware of the vast volume of purchases made throughout this country and probably throughout the world by means of credit cards, Diners' Club and many others. No lesser knowledge was possessed by these conspirators.

Since the fraudulent use of a credit card constitutes mail fraud, so also does a conspiracy to put spurious cards into circulation. The *Parr* and *Kann*[1] cases, relied on by appellants do not present similar fact situations. In *Parr* the Supreme Court was quite explicit in limiting its decision to the particular facts before it. There certain employees of a School District used the District's credit card to obtain gasoline and services for themselves. The scheme

---

1 *Kann* v. *United States*, 323 U.S. 88 (1944).

was in effect misappropriation and embezzlement of the District's property. The crime was completed upon receipt of the gasoline and services. Once the property was received, the defendants had no further interest in the billing practices of the service stations involved. All that the Supreme Court held was "Here, as in *Kann*, '[t]he scheme in each case had reached fruition' when Carrillo and Garza [the District's employees] received the goods and services complained of. 'The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] * * * would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 U.S. at 94."

Parr and *Kann* have been distinguished on a factual basis in *Kloian* v. *United States*, 349 F.2d 291, 5th Cir. 1965, *cert. denied*, 384 U.S. 913 (1966) and in *Adams* v. *United States*, 312 F.2d 137, 5th Cir. 1962. The Supreme Court itself in *United States* v. *Sampson*, 371 U.S. 75 (1962) distinguished *Parr* and *Kann* in upholding an indictment which alleged potential use of the mails as part of a scheme to defraud, a decision which Mr. Justice Douglas in his lone dissent felt "materially qualifies" *Parr* v. *United States*, 363 U.S. 370.

In *Kloian* the court pointed to the distinguishing features, saying: "There [*Parr* and *Kann*] the fraud operated through the abuse of offices held by defendants. It sounded in larceny after trust," 349 F.2d at 294. Far more pertinent to the facts here is the court's comment in *Adams* that "Appellant's scheme reasonably contemplated the utilization of a commercial practice which, taken in its entirety, embraced the use of the mails," 312 F.2d at 140.

Each defendant would isolate himself from a general conspiracy by claiming only partial participation. It is true that each defendant may not have been present on every occasion and each may have had a somewhat different role but the thread of continuity was as visible as Ariadne's thread which led Theseus safely through the Cretan labyrinth after his Minotaur adventure. The thread here is less serpentine—Confessore-Kellerman; Kellerman-Pucci; Pucci-Travers; Travers-Rivezzo, and then to Vergo's house to try to operate the machine and there to store a box of cards, Vergo assisting. The evidence was clearly adequate to justify the jury's verdict.

The point made that the machine failed to operate and that, therefore, the conspiracy was frustrated and aborted is not legally sound. A conspiracy does not require successful completion of the objects thereof.

II.

The substantive counts present a more serious problem. Was Pucci's surreptitious filching of a card to replace the card Confessore had given him and a card for his girlfriend a plausible part of the conspiracy? The conspiracy did contemplate use of the cards and there was actual use by Pucci and desired use by Travers.

Rivezzo, in particular, claims that under *Pinkerton* v. *United States*, 328 U.S. 640 (1946), Pucci's use of his card "did not fall within the scope of the unlawful project," *id.* at 647, and that at best it was a separate Pucci-Travers conspiracy. This argument is based upon the assumption that the proof clearly showed two separate conspiracies instead of one and that proof of the alleged Pucci-Travers conspiracy and Pucci's use of the card was prejudicial to him on the conspiracy count. However, the indictment

charged only a single conspiracy. It was for the jury to determine whether Pucci's and Travers' activities came within the purposes of that conspiracy and in pursuance thereof. If, as the jury must have found, Rivezzo was a member of the conspiracy, he was properly convicted under the *Pinkerton* doctrine on the substantive counts as well.

III.

Reversible error is asserted because of the receipt in evidence of 110 and 114 embossed Diners' Club cards (Government's Exhibits 1 and 2, respectively). Defendants argue that there was no explanation of the part, if any, which these cards played in the conspiracy. Of a somewhat similar character are Exhibits 7 and 31. Exhibit 7 was a schedule of duplicate embossed Diners' Club cards uncovered by Diners' Club investigators during the period February 1967 through March 1968 together with certain information relating to the cards. This schedule had 636 entries, 224 of which were the cards listed in Exhibits 1 and 2. Exhibit 31 contained 415 entries and was designed to show the total amount of fraudulent charges incurred by the use of duplicate cards over a period from February 1967 to June 1968, a total of $719,887.23. Both Exhibits (7 and 31) were stricken by the Court prior to submission of the case to the jury.

During the trial of every case, the proof has to be introduced step by step and through individual witnesses. It is often impossible to foresee the relevance of testimony or of an exhibit—particularly in the early stages of the trial. Hence the necessity of receiving the testimony or exhibit "subject to connection"—an expression which is anathema to most trial lawyers. If the testimony or exhibit is ultimately stricken, of course, there is prejudice

to the party against whom it is temporarily received. The effectiveness of the judge's charge to disregard such evidence has been debated and challenged for generations. The answer is probably to be found by trying to evaluate the degree of prejudice because no instruction can erase from any juror's mind that which he has just heard or seen. But the entire jury system is dependent upon the assumption—whether it be fiction or not—that the jury will follow the court's instructions. It is only in extreme cases that this fiction is disregarded. Witness the change from *Delli Paoli*[2] to *Bruton*.[3]

In this case the testimony and exhibits supplied a colorful backdrop and illustrated the size of the potential loss which might be inflicted on Diners' Club by the success of the conspiracy but their introduction does not constitute reversible error because the proof of the conspirators' acts was more than adequate to enable the jury to find them guilty regardless of the monetary damage inflicted on Diners' Club under other circumstances.

IV.

After suspicion had focused on Confessore, he made statements to Diners' Club employees which Rivezzo claims were inculpatory as to him and not contemplated by, or in furtherance of, the conspiracy. Admission of this testimony, Rivezzo argues, was reversible error. It may well have been an unsuccessful attempt by Confessore to exculpate himself or a statement to divert Diners' Club suspicions from his co-conspirators. In any event admission of this testimony does not come within the ban of *Bruton*.

---

2 *Delli Paoli* v. *United States*, 352 U.S. 232 (1957).

3 *Bruton* v. *United States*, 391 U.S. 123 (1968).

V.

Other errors advanced by Rivezzo, namely, the Stein testimony (American Express card given by Confessore to Stein prior to commencement of the conspiracy with promise of Diners' Club card in the future), the Chincotta testimony (purchase by Chincotta from Travers of blank Diners' Club cards on July 24, 1967 after arrest of Confessore and Pucci) and Pucci's testimony regarding Confessore's offer of a proposition whereby Pucci could earn $75,000 in an unrelated criminal venture (stricken by the Court) do not require reversal. At most they were collateral to the facts upon which the conspiracy was based. In the same category was the Court's curtailment of cross-examination as to Pucci's specific address. The denial of the motion to suppress was proper. The area searched was not Vergo's exclusively. Furthermore, the search was made with the consent of the owner, Bini.

The judgments of conviction are affirmed.

APPENDIX B

UNITED STATES CODE, TITLE 18 §371

§371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of a conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

UNITED STATES CODE TITLE 18 §1341

§1341. Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything representing to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the directions thereon or at the place at which it was directed to be delivered to the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years or both. . . ."

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 736

JOHN KELLERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and others were convicted of mail fraud and conspiracy in connection with a scheme to sell and distribute counterfeit Diners Club credit cards. The court of appeals affirmed (Pet. App. A).

The petition seeks to recanvass issues regarding the sufficiency of the evidence which were fully presented to and dealt with by the court below. Those

issues raise no question warranting further review here. In any event, the contentions are fully answered in the opinion of the court below, on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 406155 242